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No. 12

In the Supreme Court of the United States

OCTOBER TERM, 1952

FEDERAL POWER COMMISSION, PETITIONER

v.

IDAHO POWER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

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OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 6–13) is reported at 189 F. 2d 665.

JURISDICTION

The original judgment of the Court of Appeals was entered on May 10, 1951 (R. 14), and was modified on September 21, 1951 (R. 16–18). The petition for certiorari was filed on December 19, 1951, and was granted on March 3, 1952 (R. 129). The jurisdiction of this Court rests upon Section 313 (b) of the Federal Power Act and 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

The Idaho Power Company applied to the Federal Power Commission for a license to construct, operate, and maintain a hydroelectric project, including a dam, power plant, and transmission lines, which would occupy for the most part lands of the United States. The Commission granted the license, but only on certain conditions, principally that the United States should have the right at its own expense to interconnect with the project transmission lines for the transmission of Government power to the extent of the capacity available in excess of the Company's needs, with full compensation to the Company by the United States for transmitting such Government power. The Company, in its petition for review, asserted that the Commission could not lawfully attach these conditions to its order, and the Court of Appeals agreed.

The questions presented are:

1. Whether the Court of Appeals exceeded the appropriate limits of judicial review in striking the conditions from the license and in affirming the order as thus modified, without remanding the case to the Commission in order to afford the latter an opportunity, specifically requested by it in a petition to the court, to determine whether issuance of the license without the stricken conditions would satisfy the applicable standards of public interest.

2. Whether the Court of Appeals erred in construing the Federal Power Act as denying the Commission authority to condition the issuance of a license for the construction on and over public lands of a hydroelectric project, including transmission lines, upon the licensee's transmission of Government power over the proposed lines to the extent of their excess capacity, with full compensation to the licensee.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Federal Power Act (49 Stat. 847, 16 U. S. C. 791a *et seq.*) will be found in the pamphlet copies of the Act which have been filed with the Clerk. Other pertinent statutory provisions and regulations are set forth in the Appendix, *infra*, pp. 55–64.

STATEMENT

The Idaho Power Company on February 7, 1950, filed a petition (R. 1–5) in the Court of Appeals for the District of Columbia Circuit, under Section 313 (b) of the Federal Power Act (49 Stat. 847, 16 U. S. C. 791a *et seq.*) and under Section 10 of the Administrative Procedure Act (60 Stat. 243, 5 U. S. C. 1009), to review the inclusion of certain conditions in an order of the Federal Power Commission, dated October 13, 1949. This order (R. 99–110) authorized issuance of a license under Part I of the Federal Power Act for the construction, operation, and

maintenance, on and along the Snake River, in Idaho, of a proposed major hydroelectric power project, to be known as the Bliss development, consisting of a dam, powerhouse, transformers, a switchyard and two primary transmission lines.

The proposed project, exclusive of transmission facilities, would occupy 509.7 acres of lands of the United States in the State of Idaho (R. 102); and the two transmission lines, extending a total length of about 189 miles, would cross lands of the United States for a distance of more than 125 miles (R. 101). One of these lines, about 73 miles long, leads northwesterly from the Bliss plant to a point near the city of Boise, and the other, about 116 miles long, easterly to a point near the city of American Falls, both in the State of Idaho, at which points the lines would join with the Company's interconnected transmission system (R. 100–101).

The administrative proceedings before the Commission which culminated in the issuance of this license began on August 22, 1947, when the Idaho Power Company filed, under Section 4 (e) of the Act, its original application for the project (R. 26–33). This application did not propose the two long transmission lines to Boise and American Falls which were authorized by the Commission's order of October 13, 1949. (The Company did not propose these lines until its amended application of April 20, 1949, *infra*, p. 6.) In

the original August 1947 application, the Company stated, with respect to proposed transmission lines, that "The plant will be connected by tap line to the Company's 138-kv transmission network" (R. 28). The map of the proposed project area, submitted with the application, showed only two short tie lines connecting with the Company's Hagerman Valley-Boise and Hagerman Valley-Caldwell transmission lines, at points within about 6 miles from the proposed Bliss plant (Exhibit J). See also R. 34, 37, and the map at the end of this brief.[1]

On March 2, 1948, the Commission authorized issuance of a license for construction of the proposed project (R. 51–56). The Commission noted that "Although the applicant states that the power-house will be connected by tap lines to applicant's 138-kilovolt transmission network, neither the tap lines nor the switching station from which they emanate are shown to be within the project boundary on the maps submitted as part of the application." (R. 52.) Accordingly, the Commission expressly stated in paragraph 23 (g) of the order that it "reserves the right to

[1] In the amendments to the application, filed December 3, 1947, the Company did not indicate any change in the proposed transmission lines, the description being in *haec verba* identical with the original application. See R. 38. The project area map submitted with the amendments, however, did not show the termini of the proposed tap lines. (Exhibit K, dated November 1947.)

determine at a later date what transmission facilities should be included in the license as part of the project." (R. 55.)

On April 20, 1949, the Company filed an "application for supplementary amendments" to its application for license, so as to include as part of the proposed project the two primary transmission lines eventually incorporated in the Commission's order of October 13, 1949 (R. 58–60).[2] The cost of the project as originally applied for, without the transmission lines to Boise and American Falls, was estimated at $12,595,000 (R. 43). The estimated cost of the transmission lines, submitted with the amended application, was $3,400,000, raising the total estimate to $16,000,000 (R. 63). The area of lands of the United States affected by the original application, which was approximately 509.7 acres (R. 52), was increased to 1,240.93 acres as a result of the amended application (R. 81).

In response to an inquiry from the Commission concerning the amended application, the Secretary of the Interior advised the Commission, in a letter dated August 10, 1949 (R. 68–73), that on July 9, 1948, the Company applied to the Bureau of Land Management of the Department for a permit to construct over public

[2] The application showed that the two proposed transmission lines "are to be so constructed that they can without difficulty be converted for operation at 230 kilovolts, although initially they are to be operated at 138 kilovolts." (R. 101.)

lands a 230-kv transmission line, to be operated initially at 138-kv, which was to extend between Boise and American Falls, Idaho.[3] He also stated that the Department had for some time

[3] Although the Federal Power Commission is authorized to license "project works," including primary transmission lines, upon public lands and reservations of the United States (Section 4 (e) of the Federal Power Act), transmission lines on and over public lands which do not constitute "project" lines, as defined in Section 3 (11) of the Act, do not fall within the licensing authority of the Commission and remain subject to the jurisdiction of other governmental departments and agencies. See *Pacific Power and Light Co.* v. *Federal Power Commission*, 184 F. 2d 272 (C. A. D. C.). Section 3 (11) defines "project" to include "the primary line or lines transmitting power [from the project] to the point of junction with the distribution system or with the interconnected primary transmission system * * *."

The Secretary of the Interior has broad statutory authority, "under general regulations to be fixed by him," to permit the use of public lands, national forests, and reservations for electrical plants and transmission lines. 43 U. S. C. 957, 959, 961, *infra*, pp. 55–58. As appears *infra*, pp. 12–14, the Secretary of the Interior filed a formal complaint with the Commission in this case to urge that the proposed transmission lines were not "project" lines within Section 3 (11) of the Act, and hence that the Commission lacked jurisdiction to grant a license with respect to such lines (R. 111, 114–115). The Secretary of the Interior has not abandoned this position, and has specifically reserved on the record the right to renew such contention if it should be held that the Commission lacked authority to impose the conditions challenged by the Company in the present review (R. 119–121). An earlier suit brought to enjoin the construction of the transmission lines involved here did not deal with whether they were "project" lines but only with the initial jurisdiction of the Commission to determine the question upon the filing of a license application. *United States* v. *Idaho Power Company*, 85 F. Supp. 913 (D. Idaho).

been vitally concerned with the supply of power in the southern part of Idaho, that the Federal Government had hydro-electric projects in the area, and that other Federal projects were either under construction or had been authorized to be constructed.[4]

The Secretary's letter went on to state as follows: Prior to the Idaho Power Company's application for a permit to erect the transmission lines over the public lands, the Bureau of Reclamation and the Bonneville Power Administration had prepared a report entitled "Report on Availability of Power in Southern Idaho for Development of Phosphate Industry" which proposed that the United States construct, own, and operate a transmission line connecting the eastern and western parts of the southern Idaho region, the same area served by the two proposed transmission lines involved here.[5] This report was transmitted to the Idaho Power Company with a request for a conference to explore the

[4] Federal power projects in the area include Minidoka, Boise River, Black Canyon, and Anderson Ranch; under construction or authorized are Palisades and American Falls. *Annual Report of the Secretary of the Interior* (1961), pp. 136, 138–139, 143. (See map at the end of this brief.)

[5] This report discloses a plan for the ultimate delivery of power from the Bonneville Power Administration to Pocatello and the phosphate loads in that vicinity by a transmission system which in part parallels the Boise-American Falls lines involved here (Report, pp. 9–13, and map following p. 11).

possibility of cooperative arrangements in order to supply power for potential phosphate producers as soon as possible. Before any substantial discussions took place, the Company applied to the Bureau of Land Management of the Department of the Interior for the permit under which it, rather than the Federal Government, would own and operate this important tie line. (R. 69.)

The Secretary of the Interior stated, further, that extensive negotiations followed in which the representatives of the Department took the position that if the public lands of the United States were to be used by the Company for the construction of such an important part of the future power system of the region, the public interest required that the ownership and operation of this line by the Company should not interfere with the later development of federally owned power generating and marketing facilities, and that there should not be any wasteful duplication of transmission facilities. Since the Company had not shown a present need for a 230 kv line, the Department of Interior proposed to grant a preconstruction permit and later a permit or easement for the necessary right-of-way, subject, however, to the right of the Government to transmit its power over this line to the extent of its unused capacity, upon the payment of an equitable share of the opera-

tion and maintenance cost proportionate to the capacity used. (R. 69.)

In negotiations with the Department of the Interior, the Company resisted the suggested condition that the unused capacity of the line over federal lands be made available for transmission of Government power upon payment of just compensation (R. 71, 88–90). On April 11, 1949, nine days before the filing of its amended application with the Federal Power Commission (*supra*, p. 6), the Company withdrew its application from the Department of the Interior (R. 71).

The Secretary of the Interior urged upon the Commission that the proposed transmission lines were intended to be an important part of the Company's transmission system itself, and, therefore, main trunk lines, subject to his jurisdiction, rather than project lines within the Commission's jurisdiction (R. 69–70). He stated that the Company originally planned to place the power from the Bliss project on its existing lines at the Hagerman switchyard by means of a relatively short transmission line (R. 70), and that the lines which the Company sought in its amended application "constitute substantially the line for which the Company negotiated with this Department" (R. 71).[6] The Secretary expressly

[6] The various transmission lines involved in this case, and their geographical relation to one another, are shown on the map at the end of this brief.

charged that the amended application was filed for the sole purpose of ousting his jurisdiction, in order "to avoid the requirements of law that such transmission lines could be constructed on these public lands only after obtaining a permit or easement from the Secretary of the Interior" (R. 71).

The Company, in a letter to the Commission dated September 9, 1949, denied that its proposal to construct the additional facilities was prompted by the announcement of the Interior Department's transmission program, and stated its belief that the proposed lines were project lines subject to the jurisdiction of the Commission (R. 82–91).

On October 13, 1949, the Commission entered an order superseding its order of March 2, 1948 (*supra*, pp. 5–6), and reauthorized the license for the Bliss project, including the two proposed transmission lines (R. 99–110).[7] As a result of suggestions of the Secretary of the Interior (R. 94–95, 101), paragraph (F) of this order required, as a condition of the license, that the licensee permit the interconnection of transmission facilities of the United States with the two transmission lines, and the transfer over those lines of energy generated in power plants owned by the United States "in such amounts as

[7] No hearing was requested by the Company or held by the Commission on either the original application for the Bliss plant or the amended application for the transmission lines (R. 126).

will not unreasonably interfere with the licensee's use of said lines" (R. 107–110). The Company was to be compensated in full for any transmission of Government power (R. 108).

The Commission expressly found, in accordance with the statutory requirements (Section 10 (a)), that "under present circumstances and conditions and upon the terms hereinafter imposed, the project is best adapted to a comprehensive plan for the improvement and utilization of water power development and for other beneficial public uses, including recreational purposes" (R. 102–103).

On October 13, 1949, the same day that the Commission's order was issued, the Secretary of the Interior filed a formal complaint against the Idaho Power Company "to protect our procedural rights before the Commission" (R. 110), in which he reiterated the views formerly expressed by letter and requested that the Company's application be dismissed or denied (R. 111–115). After learning that the amended license had been authorized with the described conditions, the Secretary of the Interior on November 17, 1949, wrote the Commission (R. 119–121) that the attachment of the conditions to its order was "a great forward step * * * in the protection of the Government's interests." (R. 119.) The letter stated (R. 119–120):

> The principle that transmission facilities constructed over Government lands

should be made available, to the extent of their unused capacity, to the United States upon reasonable terms is important both to the utilities and to the United States. It is important to the utilities, because it means that transmission capacity will not be wasted and that there will be a more economical use of transmission facilities in the public interest. It is important to the United States, because it means avoidance of wasteful duplication of facilities, and therefore, more economical development and utilization of the vast potential hydroelectric resources in the Western States.

As you know, the Idaho Power Company made every effort to escape substantially the same requirements of this Department covering the use of public lands for the construction of transmission lines. It is, therefore, most gratifying that the Commission moved so promptly in applying the principle of uniformity of governmental purpose, by making it impossible here for this or any other company to submit to the jurisdiction of one agency of Government as an escape or protection from another.

The letter stated, further, the Secretary's understanding that if the Commission was precluded by the courts from requiring the conditions, the lands involved would be returned to the jurisdiction of the Department so that the terms of its regulations imposing similar conditions

might be put into effect (R. 121). The Acting Chairman of the Commission replied that the Secretary of the Interior was correct in understanding that "if the Commission is found to be without jurisdiction, the lands will be returned to the Department of the Interior." (R. 122.)

The Company's petition for review in the Court of Appeals prayed that the court modify the Commission's order by striking paragraph (F), remand "the cause to the Commission for further action consistent with the determination of this Court," and grant other appropriate relief (R. 5).

The court below held that Congress had withheld from the Commission authority to prescribe the challenged condition (R. 6–13). Its opinion, as originally filed on May 10, 1951, stated in the final paragraph (see R. 15):

> The order of the Commission will be modified by the elimination therefrom of paragraph (F), and the case will be remanded to the Commission for the entry of an order in accordance with this opinion.
>
> Remanded for modification of order.

Being uncertain whether the court's opinion and judgment "requires the Commission to enter an order in the exact form of the original order, after eliminating paragraph (F), or whether the Commission is free to reconsider the remainder of the order and to enter such other order as it deems warranted in the exercise of its administra-

tive discretion under the Federal Power Act" (R. 15), the Commission thereafter moved for clarification of the judgment to make it clear that upon remand the Commission would be free to determine whether or not issuance of the license without the conditions contained in paragraph (F) would be in the public interest (R. 15–16).

On September 21, 1951, the court entered an order modifying its opinion by substituting, in place of the paragraph quoted above, the following (R. 16):

> The order of the Commission will be modified by the elimination of paragraph (F), and the order as thus modified will be affirmed. 49 Stat. 860 (1935), 16 U. S. C. A. Sec. 825l (b).
>
> Modified, and affirmed as modified.

INTRODUCTION AND SUMMARY OF ARGUMENT

The effect of the decision below is to compel the issuance of a license to the Idaho Power Company without the conditions, found by the Commission to be required if a license were to be granted, for the "wheeling"[8] of power generated by the United States. This was a license to construct a private electric power project on public lands, which the Federal Power Commission could grant only upon a finding that the the project is "best adapted to a comprehensive

[8] *I. e.*, transmission of another's power over one's lines.

plan * * * for the improvement and utilization of water-power development, and for other beneficial public uses * * *; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project * * * before approval." (Section 10 (a).) The Act also specifically provides that all licenses shall be subject to "such other conditions not inconsistent with the provisions of this Act as the Commission may require." (Section 10 (g).) In this case the Commission found that the proposed project would meet the statutory standards if the license contained the condition for transmission of Government power on the available excess capacity of the lines.

The court below has in effect substituted its own judgment with respect to satisfaction of the statutory standards for that of the agency to which Congress had confided the determination of this question, contrary to well-established principles defining the relationship and complementary functions of administrative agency and reviewing court. Under these principles, even if no authority existed in the Commission to include the disputed conditions, the proper procedure was to remand the proceedings to the Commission for a determination of whether a license without these conditions would meet the standards of public interest specified by the statute.

Apart from its erroneous assumption of an administrative function belonging exclusively to the

Commission, the court below also incorrectly held that the Commission lacked authority to include the conditions in the license. The authority exercised by the Commission in this case derives from specific provisions in Part I of the Federal Power Act, which deals with the licensing of power projects on public lands or on waters subject to federal control. Part II of the Federal Power Act, enacted in 1935, in which the court below found a limitation on the powers vested in the Commission by Part I, is a comprehensive scheme for the federal regulation of the interstate transmission of electric energy. Part II specifically authorizes the Commission in Section 202 (b) to direct interstate public utilities (i. e., companies subject to regulation under Part II) to interconnect their transmission facilities with the facilities of others. It nowhere in terms prohibits interconnection with Government lines. Section 201 (f), relied on by the court below, provides only that nothing in Part II shall apply to the United States. The legislative history makes clear that the purpose of this provision, so far as pertinent here, was only to withhold from the Commission power under Part II to direct companies subject to its regulatory authority under that Part to interconnect with Government transmission lines. There is no suggestion, either in the terms of the statute or in the legislative history, that this limitation with respect to the regulation of facilities of interstate public utilities

under Part II had any relation to the licensing powers granted the Commission in Part I, including the power to determine what conditions were required by the public interest to be attached to a license for the construction of a new private power project on Government-owned lands. Hence, contrary to the view of the court below, the inclusion of these conditions for interconnection with Government power lines, in a license under Part I to use public lands for constructing a private commercial hydroelectric project, was "not inconsistent" with Section 201 (f), or indeed with any other provision of the Act.

ARGUMENT

I

Even if the conditions which the Commission attached to its order were unlawful, the Court of Appeals erroneously exercised an administrative function, beyond the proper limits of judicial review of administrative action, in modifying the license by eliminating the conditions

A. An exercise of the Commission's judgment is required by statute

Part I of the Federal Power Act (49 Stat. 847), which was originally enacted in 1920 as the Federal Water Power Act (41 Stat. 1063), authorizes the Federal Power Commission to issue licenses for the use of public resources in the construction, operation, and maintenance of privately owned hydroelectric projects under appropriate conditions for the protection of the public interest. (Section 4 (e).) The Act es-

tablishes large areas for the exercise of administrative judgment and confers broad powers upon the Commission.

Under the statute, each "license shall be conditioned upon acceptance by the licensees of all the terms and conditions of this Act and such further conditions, if any, as the Commission shall prescribe in conformity with this Act * * * ." (Section 6.) One of the specified statutory conditions is that the project be such "as in the judgment of the Commission will be best adapted to a comprehensive plan * * * for the improvement and utilization of water-power development, and for other beneficial public uses." (Section 10 (a).) The Commission is further authorized "if necessary in order to secure such plan * * * to require the modification of any project and of the plans and specifications of the project works before approval" (*ibid.*) and to impose, in its discretion, "such other conditions not inconsistent with the provisions of this Act" as may be required. (Section 10 (g).) Orders of the Commission are reviewable in the courts of appeals, which are bound by the Commission's findings of fact "if supported by substantial evidence." (Section 313 (b).)

The Federal Power Act thus clearly requires, as a condition to the issuance of a license, "the judgment of the Commission" in the determination of whether, and on what terms, a proposed

hydroelectric project on lands of the United States should be licensed as best adapted to a comprehensive plan for the improvement and utilization of water power development and for other beneficial public uses. In this case, the Commission exercised such a judgment in determining that the Bliss project will meet this test "under present circumstances and conditions and upon the terms hereinafter imposed" (R. 102). But the Commission has not decided, and it has been denied the opportunity to decide, whether the project will fulfill the Act's requirements if the prescribed terms and conditions are omitted or changed.

It is clear from the terms of the order that the conditions prescribed are an inextricable part of the finding which the statute required the Commission to make before it could approve the license. The Commission has made no finding with respect to the license shorn of the conditions and, until it does make such a finding, it has no authority under the statute to approve the license. The rule is settled that in the absence of basic findings, no order of an administrative tribunal can be sustained. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 431–433; *Florida* v. *United States,* 282 U. S. 194, 215; *Mahler* v. *Eby,* 264 U. S. 32, 43–45; *Wichita R. R.* v. *Public Utilities Commission,* 260 U. S. 48, 59. See also dissenting opinion of Mr. Jus-

tice Stone in *United States* v. *Chicago, M., St. P. & P. R. Co.*, 282 U. S. 311, 342–344. In disregard of this rule, the decision below leaves in effect an order which the Commission not only did not enter but which, in the absence of the statutory finding which only the Commission could make, it was without authority to enter.

Not only did the court below leave in effect an order not supported by the requisite statutory finding, but, in modifying the license to delete a condition deemed necessary by the Commission, it also left in effect an order which the Commission never made and which is substantially different in character from the order which the Commission did make. The change in the order was not made by the Commission but by the court below, which has assumed the power to rewrite and revise the provisions of the order. In so doing, the court has attempted to exercise an administrative function delegated by Congress to an administrative tribunal. It is immaterial that the Commission may have invalidly prescribed the terms and conditions which it imposed upon the license. The fact remains that the sole tribunal empowered to grant the necessary authority has granted it only subject to such terms and conditions.

B. This judgment cannot be exercised by the reviewing court

If the court purported to make the necessary findings and exercise administrative judgment,

it acted in disregard of the firmly established principle that the courts will stay their hands until the expert administrative agency to which Congress has entrusted a policy or factual determination has had an opportunity to act. *Far East Conference* v. *United States,* 342 U. S. 570; *Tank Car Corporation* v. *El Dorado Terminal Co.,* 308 U. S. 422, 432–433; *St. Louis, Brownsville & Mexico Ry. Co.* v. *Brownsville Navigation District,* 304 U. S. 295, 301; *Southern Ry. Co.* v. *Tift,* 206 U. S. 428, 437–438; *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426, 448; see also *United States* v. *Interstate Commerce Commission,* 337 U. S. 426, 437; *United States* v. *Jones,* 336 U. S. 641, 652–653, 670–671, 672–673.

The most recent statement of the rule requiring judicial deference to primary administrative jurisdiction is found in *Far East Conference* v. *United States, supra,* where the Court "applied a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over" (p. 574). The Court also stressed the policy of achieving "uniformity and consistency in the regulation of business entrusted to a particular agency * * * by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agen-

cies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure" (pp. 574–575).

And the same principle has been applied in circumstances like these, where some aspect of administrative action has been held beyond the agency's authority. It has been recognized that the administrative judgment may be affected by the new situation which the limitation of its power creates. Accordingly, remand of the proceedings to the administrative agency for the exercise of its expert judgment in the light of the changed circumstances has been deemed the proper procedure. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 55; *Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, 612–614; *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 618–619; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 145; *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364, 373–374; *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, 218.

Statutory requirements for initial administrative determinations are frustrated if the reviewing court attempts to prejudge the administrative result by assuming that invalidation of part of an order would not affect the administrative judgment with respect to the remainder. Correction

of an error of law in the agency's determination exhausts the judicial power. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134. Judicial review of a legal question "does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge" and the Commision is "again charged with the duty of judging the application" by the applicable statutory standard of "public convenience, interest, or necessity." 309 U. S. at 145.

Accordingly, in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, recognition that two invalidated qualifying clauses "constitute an important limitation" to the Commission's order prompted the Court to give the Commission "an opportunity to reconsider the entire provisos in light of our rejection of the qualifying clauses, and to refashion these provisos as may be deemed necessary." 334 U. S. at 55. Similar deference to the exercise of administrative discretion was paid in *Addison* v. *Holly Hill Co.*, 332 U. S. 607, where the writing of a definition committed by Congress to agency determination, after invalidation of a part, was returned to the Administrator because "It would be the sheerest guesswork to believe that elimination of an important factor in the Administrator's equation would have left his equation unaffected even if he did not here

insist upon its importance." 332 U. S. at 618–619. And in *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, where complete suppression by the Federal Trade Commission of misleading trade names was held too drastic, correction of the order was deemed "a matter which the commission has not considered but which, as the body having primary jurisdiction, it should, in the first instance, consider and determine." 288 U. S. at 218. See also *Reconstruction Finance Corporation* v. *Bankers Trust Co.*, 318 U. S. 163, 170; *United States* v. *Baltimore & Ohio Railroad Company*, 284 U. S. 195, 203.

The appropriate scope of judicial action is not enlarged by the statutory provision for review of Commission orders which authorizes the courts "to affirm, modify or set aside such order in whole or in part." (Sec. 313 (b).) This language does not empower a reviewing court to exercise an essentially administrative function, or permit judicial determination of the statutory policy committed to an administrative agency. Similar language for judicial review was involved in *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364, where the "familiar appellate practice" of remanding causes to the administrative agencies for appropriate action is described (305 U. S. 373–374), and in *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212; *Siegel Co.* v. *Federal Trade Commission*, 327

U. S. 608; and *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, where judicial invalidation of administrative action resulted in remand rather than exercise by the courts, in the first instance, of the agency function.[9] And see *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U. S. 515, 532–536.

Inherent in the refusal of the court below to remand the question of issuing the license for Commission redetermination is the assumption that the court was authorized to decide, as an original matter, unaided by prior Commission action, that the proposed project, without the important condition, was "best adapted to a comprehensive plan * * * for the improvement and utilization of water-power development, and for other beneficial public uses." This would appear to be exercise of an administrative rather than a judicial function (see *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266) which is inconsistent with other provisions of the Act. If Congress had intended to establish the Court

[9] This Court has affirmatively indicated that it regards judicial review under the Federal Power Act as essentially the same as the traditional limited review of administrative action. *Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, 612, note 3; *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156; *Federal Power Commission* v. *Metropolitan Edison Co.*, 314 U. S. 375; see also, *Savannah River Electric Co.* v. *Federal Power Commission*, 164 F. 2d 408 (C. A. 4).

of Appeals as "a superior and revising agency in the administrative field," then "its decision was not a judicial judgment reviewable" by the Supreme Court. 289 U. S. at 274; *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 144. But Congress obviously had no such intention because Section 313 (b) specifically provides that the judgment of the reviewing court shall be "subject to review by the Supreme Court of the United States upon certiorari or certification as provided in * * * the Judicial Code, as amended." [10]

C. A remand is required unless the agency clearly manifests its intention to permit the modified order to stand

To require remand to the Commission where the invalidation of parts of an order vitiates the agency's finding does not foreclose the possibility of judicial modification in other circumstances. In a manner somewhat analogous to dealing with the separability of invalid provisions of a statute (cf. *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 362), part of an order may be eliminated and the remainder upheld where it is clearly manifest that the provisions of the order

[10] Moreover, the other provisions of Section 313 (b), relating to the conclusiveness of the Commission's findings of fact "if supported by substantial evidence," and to the procedure for taking additional evidence, clearly contemplate the traditional relationship between the administrative agency and the reviewing court.

are entirely separable and that the agency plainly intended that the remaining portion should continue in effect even though the rest be stricken."[11] See *United States* v. *Chicago, M., St. P. & P. R. Co.*, 282 U. S. 311. In that case an order of the Interstate Commerce Commission was affirmed although certain conditions were invalidated. The majority opinion indicates, however, that it was based primarily on the view that the subject matter of the condition had no relation whatever to the subject matter of the proposal for which authority was sought and that the Commission had dealt with the condition "as an independent and separate matter" (p. 330). Consequently, the Court, in an opinion by Mr. Justice Sutherland, regarded the condition as being a separable and collateral part of the order which was not germane to the remaining parts. On the other

[11] This explains court decisions enforcing less than an entire order of an administrative agency which prohibited various types of conduct as violative of statutory standards committed to initial administrative enforcement. *National Labor Relations Board* v. *United States Truck Co.*, 124 F. 2d 887 (C. A. 6); *Alberty* v. *Federal Trade Commission*, 182 F. 2d 36 (C. A. D. C.); *Gimbel Bros.* v. *Federal Trade Commission*, 116 F. 2d 578 (C. A. 2); *Educators Ass'n* v. *Federal Trade Commission*, 108 F. 2d 470, modified, 118 F. 2d 562 (C. A. 2); *Belmont Laboratories* v. *Federal Trade Commission*, 103 F. 2d 538 (C. A. 3). To the extent that these decisions modify the remedy prescribed they are consistent with the principle stated since it is clear that the agency would not want to abandon enforcement because the method of enforcement was modified.

hand, the dissenting Justices (Holmes, Brandeis, and Stone) were of the opinion that the entire order was a unity, that the Commission intended it to be considered as such, and, therefore, that the condition could not be eliminated without impairing the entire order.

Unless it is clear, therefore, that the Commission would have authorized the license without the conditions, the entire order must stand or fall. See *United States* v. *Lowden*, 308 U. S. 225, 229. Here there is no question but that the subject matter of the conditions is intimately related to the subject matter of the license and that the conditions are an inextricable part of the license which the Commission authorized. That the Commission in authorizing the license plainly intended the conditions to be inseparable is clearly shown on the record.

The record makes clear that the Secretary of the Interior would interpose strenuous objections to issuance of the license without the condition requiring interconnection. This is plain not only from the letters setting forth his views (R. 68–73, 94–95), but is emphasized by his filing of a formal complaint to protect the procedural rights asserted by him (R. 110–115). Opposition of the Secretary of the Interior to the jurisdiction of the Commission and to the issuance of the license was withdrawn only as a result of inclusion of the conditions in paragraph (F) (R. 119–

121). *Supra,* pp. 12–14. The action of the court below would deprive the Commission of the benefit of the views of the Secretary of the Interior in a full hearing on his objections to a grant of the license without such conditions.

The Commision's finding on March 2, 1948, on the original application, that the statutory standard had been satisfied without the condition here in question, did not relate to these transmission lines, which were not described in that application. *Supra,* pp. 4–6. The condition was later imposed because of the amended application for a license to construct transmission lines, which are an important part of the project. The signifinance of the change in the proposed project is evidenced by the fact that it added almost 200 miles of transmission lines at a cost of $3,400,000 and affected some 700 additional acres of public lands. *Supra,* p. 6. Moreover, the need for transmission lines available to carry Government power in the area and from Bonneville across southern Idaho for use in connection with development of the phosphate industry would be an important factor in determining whether a license without these conditions would satisfy the statutory requirement of comprehensive development and utilization. The prior findings, therefore, are not relevant to this aspect of the project. The adequacy of the Commission's finding, as a factual matter, that the

condition to the license for the transmission lines was necessary to satisfy the statutory standards, has not been challenged (R. 117, 124).

In these circumstances, if the condition imposed by the Commission was unauthorized by law, the proper procedure was to remand the cause to the Commission for further proceedings consistent with the court's ruling. This would permit the primary determination by the Commission of compliance with the statutory standards, in the absence of an invalid condition. Its new findings would, of course, be conclusive if supported by substantial evidence on the record as a whole. In precluding the exercise of such administrative judgment by eliminating a condition found appropriate by the Commission to satisfy the statutory standard of public interest, and by making the order effective without the condition, the decision below plainly contravened established standards of judicial review.

II

The Commission is authorized under the Act to condition a license to exploit public resources upon the licensee's transmission of Government power

The court below not only misconceived the scope of its own authority in reviewing orders of the Commission, but also, we submit, misconstrued the extent of the Commission's licensing powers under Part I when it held that a require-

ment of interconnection with Government transmission lines as a condition to the private use of public resources was unauthorized because Congress had withheld authority under Part II to require interconnection with Government lines in the regulation of use of their own resources by interstate utilities.

Under the Constitution, Congress acts as the proprietor of Government lands and, as this Court said in *United States* v. *City and County of San Francisco*, 310 U. S. 16, 29, "The power over public land thus entrusted to Congress is without limitations." See also *Hamilton* v. *Regents of University of California*, 293 U. S. 245, 258; *Sinclair* v. *United States*, 279 U. S. 263, 297. The court below recognized the plenary power of Congress over the public lands and its authority to impose conditions without limitation, but construed the Federal Power Act as denying the authority which the Commission here exercised. It pointed out that Section 10 (g) in Part I, upon which the Commission in part relied, permits only such license conditions as are "not inconsistent with the provisions of this Act," interpreted Part II of the Act as prohibiting the Commission from requiring interconnection of Government lines with private lines, and concluded that the condition in question was therefore inconsistent with the Act.

A. Statutory language and background

Neither the statutory provisions nor the legislative discussions, particularly in the light of the historical background of power regulation, justify this restriction upon the Commission's licensing authority over private exploitation of Government lands. The present Federal Power Act embodies three major enactments. The original statute—the Federal Water Power Act of June 10, 1920, 41 Stat. 1063—created the Federal Power Commission and established complete machinery for licensing the construction, operation, and maintenance of water power projects on public lands. The Act of June 23, 1930, 46 Stat. 797, reorganized the Federal Power Commission, substituting an independent agency for the former commission consisting of the Secretaries of the Departments of War, Interior, and Agriculture. The Public Utility Act of August 26, 1935, 49 Stat. 838, provided a scheme for regulation of public utility holding companies by the Securities and Exchange Commission in Title I, and contained amendments and additions to the Federal Water Power Act in Title II.

Title II, designated the "Federal Power Act," was itself divided into three parts, relating (1) to amendments to the existing Federal Water Power Act, (2) to regulation of public utility companies engaged in interstate commerce, and (3) to pro-

cedural and administrative provisions applicable both to licensees and public utilities. This title gives the original Water Power Act, as amended, the heading "Part I," and numbers the two new parts as Part II and Part III.

Part I relates exclusively to provisions for the improvement of navigation, the development of water power, and the use of public lands in relation thereto, and the Commission acts through the issuance of licenses to make use of Federal water power and public lands. Reenacted in substantially the same language in Part I of the 1935 Act were various specific provisions of the Federal Water Power Act of 1920, which, taken separately or together, leave no room for doubt that, under the 1920 Act as carried over into Part I, the Commission was given ample affirmative authority to impose conditions like those involved here upon the grant of a license to use public lands for purposes of constructing a private power project. These provisions will be discussed later in this brief, *infra*, pp. 46–50. It suffices here to note the following sections of Part I:—

Section 6; "* * * Each such license shall be conditioned upon acceptance by the licensee of all the terms and conditions of this Act and such further conditions, if any, as the Commission shall prescribe in conformity with this Act, which said

terms and conditions and the acceptance thereof shall be expressed in said license. * * * ".

Section 10:

"All licenses issued under this Part shall be on the following conditions:

(a) That the project adopted * * * shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan * * * for the improvement and utilization of water-power development, and for other beneficial public uses * * *; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project * * * before approval.

* * * * *

(g) Such other conditions not inconsistent with the provisions of this Act as the Commission may require.

Section 4:

The Commission is hereby authorized and empowered

* * * * *

(g) Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of developing electric power, public lands * * * and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region.

Obviously, avoidance of wasteful duplication of transmission facilities by requiring the fullest utilization of existing lines could properly be regarded by the Commission as relevant to "the improvement and utilization of water-power development" (Section 10 (a)), and as a means "appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region" (Section 4 (g)).

Part II, added by the 1935 Act, relates exclusively to the regulation of utility companies engaged in the interstate transmission and sale of electric energy. Part II is an exercise of the commerce power, and not of the power over public lands. The authority to establish power supply regions and to require interstate utility companies to interconnect and coordinate their transmission and generating facilities (Section 202 (a) and (b)), specifically made inapplicable to the United States, was part of this new field of regulation.

The court below did not deny that the Commission had authority under the 1920 Act to require a private power company to transmit Government power as a condition to exploiting public resources and using public lands. It did hold, however, that such authority was withdrawn in 1935, because Part II did not confer authority to require transmission of Government

power over lines, not requiring a license, owned by interstate public utilities: But the pertinent provisions of Part II relied on by the court at most spell out a lack of authority in connection with the creation of a new and additional field of regulation; and there is no indication of any intention to withdraw or limit the authority which the Commission unquestionably had under the provisions of the Federal Water Power Act of 1920, which were carried over into Part I of the 1935 Act (*supra,* pp. 34–36).

Section 202 (a) of Part II requires the Commission to divide the country into regional districts for the voluntary interconnection and coordination of electric power facilities. Section 202 (b) authorizes the Commission under prescribed conditions to "direct a public utility * * * to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy." Section 201 (f) provides that "No provision in this Part shall apply to, or be deemed to include, the United States * * *." The court held that these provisions prevented the Commission, in the exercise of its licensing powers under Part I, from requiring licensees, as a condition to the use of public lands for private transmission facilities, to transmit electric power of the United States upon payment of reasonable compensation to the extent of available excess capacity.

The grant of new regulatory powers to the Commission ~~contained~~ in Part II contained no limitation, express or implied, on the Commission's existing licensing authority under Part I and the Federal Water Power Act of 1920. Before the enactment of Section 202 of Part II in 1935, the statute contained no provision authorizing the Commission to require the interconnection of transmission lines of public utilities in interstate commerce. But no such provision was needed in order to authorize the Commission, in exercising its power to license projects on public lands, to require interconnection of project lines with Government lines. Hence the only effect of Section 201 (f), as applied to this problem, is to make the authority of the Commission granted in Section 202 of Part II, to require interconnection of transmission lines of utility companies engaged in interstate commerce, entirely inapplicable to the United States or any of its agencies or instrumentalities. S. Rep. 621, 74th Cong., 1st Sess., p. 19.

Section 6 empowers the Commission to prescribe conditions "in conformity with this Act," and Section 10 (g) uses similar language in authorizing "such other conditions not inconsistent with the provisions of this Act as the Commission may require." If a Commission action constitutes an appropriate and lawful exercise of its licensing powers

under Part I, such action is not rendered unlawful merely because the Commission could not have taken it under the independent regulatory powers granted in Part II. It bears repetition that the transmission lines here involved were part of the "project" for which the Company sought a license under Part I; they were not transmission lines as to which no license was required and which were brought within the Commission's jurisdiction only by the regulatory authority under Part II.

B. Legislative history of the 1935 Act

The court below relied principally upon Section 10 (g), which authorizes the inclusion in project license orders of "such other conditions not inconsistent with the provisions of this Act as the Commission may require." The court thought these conditions were inconsistent with Part II, particularly Section 201 (f), and it placed great reliance upon the legislative history of the Act in reaching the conclusion which the statutory language itself obviously does not require. The opinion states (R. 10–11):

> The question whether the United States should require a private company, licensed to construct a private power plant on public lands or to cross public lands with its transmission lines, to interconnect its facilities with public power projects, was a major one in the consideration of the poli-

> cies and terms of power development upon public property. It was a highly controversial issue. During the course of the consideration of the bill which eventually became the Federal Power Act, the subject was broached at least three times, and upon each occasion the witness testifying on behalf of the bill as the representative of the Power Commission assured the Congress that the proposed bill did not make it possible for the Government to utilize the transmission lines of private companies or to require the transmission of power generated by a Government plant over the lines of private operating companies. * * *

The court then quoted the testimony of Mr. Dozier DeVane, at that time Solicitor of the Federal Power Commission, before a Congressional committee (R. 11). But this very testimony demonstrates that the court below misunderstood its effect and plainly shows that none of it related to interconnection with proposed lines of applicants for licenses seeking permission to use public lands, as the court below thought. Mr. DeVane's prior general explanation of the structure of Title II of the 1935 Act makes clear that Part II [12] was not intended to amend in any

[12] While under discussion before the committees of Congress, what are now referred to as Parts I, II, and III of the Federal Power Act were referred to as Title I, Title II, and Title III of Title II, respectively.

way the licensing provisions of the Water Power Act included in Part I.[13] And Mr. DeVane's specific discussion of interconnection shows that it did not relate to the Commission's licensing power under Part I, but only to the new regulatory powers conferred by Part II and the Commission's authority to require interconnection of transmission lines under Section 202 (b) of Part II.[14]

[13] Mr. DeVane's testimony is as follows (Hearings before H. Interstate and Foreign Commerce Committee, 74th Cong., 1st Sess., on H. R. 5423, p. 459):

"Mr. Mapes. Until we get down to Title II of Title II of the bill, the provisions in this bill in Title II, that is in Title I of II, are amendments to the present Federal Water Power Act?

"Mr. DeVane. That is correct, sir.

"Mr. Mapes. And, Title II and Title III of Title II, are they entirely new matters?

"Mr. DeVane. Entirely new matters.

"Mr. Mapes. And you are not proposing to amend the licensing section or provisions of the Water Power Act?

"Mr. DeVane: The new matter makes no amendments to the licensing sections of the Water Power Act. In Title III of the present Act have been brought forward some of the provisions that are purely administrative in character that now appear in the Federal Water Power Act, and as I read those provisions I will explain how they are handled."

[14] Hearings before H. Interstate and Foreign Commerce Committee, 74th Cong., 1st Sess., on H. R. 5423, pp. 514–515:

"Mr. Wolverton. Under the provisions of this bill, would it be possible for the Government in any of its electric operations to utilize the transmission lines of private companies?

"Mr. DeVane. No, sir; and I want to make that very definite; and if there is any doubt about it, so far as I am concerned, such amendment might be made as to make it clear.

All discussion of "this bill" and the nature of the regulation is consistent only with the provisions of Part II. Mr. DeVane's definition (fn. 14) of the two purposes of the bill to "aid State regulation" and "to deal only with rates that State Commissions cannot regulate," applies exclusively to regulation of interstate utilities and has no application to licensing of water projects. His testimony (fn. 14) that the act excludes State, municipal, and Government projects from jurisdiction of the Commission, can only refer to Part II because, as the Solicitor of the Commis-

We have attempted in this bill, Mr. Wolverton, to accomplish these two purposes; One is not to supersede, but aid State regulation; and insofar as rates are concerned, to deal only with rates that State Commissions cannot regulate.

"We have, insofar as State, municipal, or Government projects are concerned, excluded them from the jurisdiction of the Commission or from coming under this act. We have been earnest and honest in our effort to accomplish this result. We think we have done it. If we have not and it is the desire of Congress not to bring Government projects under the jurisdiction of the Commission, or give the municipal or governmental projects the right to use the transmission lines of private industry—and we have not succeeded in making that clear in this bill—an amendment should be proposed that will do it better. It will receive our hearty endorsement.

"Mr. Wolverton. Let me suggest a possible situation. Your answer will clarify my mind considerably as to the effect of this bill in the particular instance: Assume that a municipality built a plant for the generation and distribution of electric energy; assume that a distant community is serviced by a company that comes under the regulation of this bill in that it procures its electric energy from outside of the State. Could the city which has constructed a plant, but has no

sion, he knew that state and municipal projects had been explicitly made subject to the licensing jurisdiction of the Commission in Part I since 1920. Surely, this answer did not nullify the provisions of Section 4 (e), authorizing states and municipalities to obtain licenses from the Com-

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transmission lines, utilize the system of transmission lines constructed by the private company?

"Mr. DeVane. No, sir.

"Mr. Wolverton. Then, you do not think that the power given in this bill to the Federal Power Commission would enable it to direct that those transmission lines be so used?

"Mr. DeVane. Mr. Wolverton, my answer to that is this: That if there is any doubt about it and this committee can remove that doubt by additional words in this bill, let us put them in.

"Mr. Wolverton. I do not think that anybody could be more anxious to be fair.

"Yesterday you suggested an amendment with respect to rates that cleared up a situation which was not clear until you offered the amendment; and your willingness to suggest an amendment of that kind, if the committee deems it necessary, indicates your sincere effort to have no doubt as to the meaning of the language used.

"Mr. DeVane. I am sincere in all I say to you in connection with that matter. We are not attempting to get control in any manner of municipal, State, or Federal projects, or the energy produced by those projects. That is the Commission's position. The Chairman of the Commission just stated to me that I could announce that is the Commission's position in this matter.

"Mr. Wolverton. May I ask, did you participate in the drawing of this bill?

"Mr. DeVane. Of Title II of Title II.

"Mr. Wolverton. Yes.

"Mr. DeVane. Yes; sir; I participated in it, in making suggestions. I worked on it some; yes, sir."

mission for the construction of hydroelectric projects nor the provision of Section 7 (a) requiring that they be given preference, and it has never been so contended. Moreover, Mr. Wolverton's question about "a company that comes under the regulation of this bill in that it procures its electric energy from outside of the State," is pertinent only to jurisdiction under Part II, which is based on interstate transmission of energy, and has no application to jurisdiction over licensees for water power projects under Part I, which is based on the use of federal resources. Finally, any possible doubt concerning references to "this bill," throughout the discussion, is entirely removed when Mr. DeVane, in response to Mr. Wolverton's question if he helped "in the drawing of this bill," asked specifically whether Mr. Wolverton was referring to Title II (now Part II) of Title II, and Mr. Wolverton replied, "Yes."

Part II of the Federal Power Act marked a new venture of the Government in the regulation of public utilities, based upon the interstate transmission of electric energy, and constituted a complete departure from the previous system founded on the licensing of the construction and operation of hydroelectric projects in connection with the use of navigable streams or public lands. Mr. DeVane's testimony did no more than explain that it was not the purpose of the new legislation creating additional regulatory powers to author-

ize the Commission to require interconnection with Government lines by interstate public utilities being brought under regulation by Part II. This purpose was carried out by Section 201 (f) and other Senate committee amendments to the original bill.[15]

But failure to create authority under Part II to require interconnection in the regulation of the interstate transmission of power by private companies does not amount to a limitation of preexisting authority in the licensing of private persons to use public lands and federal water power.[16] The language of Part II is only that certain new powers are created and these new powers do not extend to Government lines. The decision below

[15] Section 201 (f) by its express terms merely exempts public agencies from the provisions of Part II. The Senate Committee Report, in discussing that new subsection, stated that one purpose was to make it clear that the Commission was not being given authority under Part II "to compel private utilities to establish connection or exchange power with public plants." S. Rep. No. 621, 74th Cong., 1st sess., p. 19. It may be noted that the Senate also amended the definition of "person" in Section 3 (4) so as to exclude public agencies; since the interconnection powers given the Commission in Section 202 (b) were limited to "persons," this amendment of Section 3 (4) also had the effect of preventing the Commission from requiring interconnection under Section 202 (b) with facilities of public agencies.

[16] It is possible that a company may come under Part I and not under Part II, since Part I applies to "licensees" and Part II to interstate public utilities, and these are not necessarily coextensive. Cf. *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U. S. 414, 418.

would convert the limited grant of additional power into the repeal of authority previously enjoyed.

C. The decision below is inconsistent with general provisions in the Act relating to licenses

The interpretation of the court below not only is unsupported by the distortion of a limited grant into an affirmative prohibition but is inconsistent with the policy, expressed in various provisions of Part I, of using the public domain to advance the public interest and grant governmental priority. Perhaps most significant in this connection is the requirement of Section 10 (a) that licenses shall be granted only for such projects "as in the judgment of the Commission will be best adapted to a comprehensive plan * * * for the improvement and utilization of water-power development, and for other beneficial *public* uses, including recreational purposes." [Italics added.] Section 10 (a) also provides that "if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval."

Because of the relation of Government hydroelectric power projects to the Bliss project transmission lines, and the avoidance of wasteful duplication facilities thereby achieved, the Commission was justified in finding that the con-

ditions in question were necessary to satisfy the Section 10 (a)'s requirement of adaptation to a comprehensive plan for utilization of water power development.[17] Moreover, the specific provision authorizing modification of a proposed project before approval would seem clearly to establish the authority to modify the project by requiring interconnection with adjacent projects if such interconnection would be better adapted to the comprehensive plan. In authorizing such water power development as proposed in the Bliss project, the Commission may not limit its consideration to that plant alone but must necessarily consider the relationship of the Bliss project to the development of water-power resources in the area. This authority is confirmed by further express grant to the Commission in Section 4 (g) of authority to order an investigation of occupancy of public lands for the purpose of developing electric power "and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the

[17] It should be noted that the Company has made no contention, either before the Commission or on this review, that no facts were shown to justify the imposition of the challenged condition (see R. 124). The sole contention is that, as a matter of law in construing the statute, the Federal Power Act affirmatively withheld from the Commission the authority to attach such conditions to license orders under Part I. Accordingly, there is no issue here whether, assuming the existence of such authority, the Commission properly exercised it in the circumstances of this case.

navigation and waterpower resources of the region." Consideration of regional development in the public interest is also required by Section 7 (a) which calls for the judgment of the Commission upon conflicting applications and issuance of the license to the applicant presenting plans which "are best adapted to develop, conserve, and utilize in the public interest the water resources of the region"; and Section 7 (b) requiring denial of an application for a project when in the judgment of the Commission federal development "of any water resources for public purposes" is desirable. These specific provisions granting affirmative authority in Part I, which except for Section 4 (g) were carried over from the 1920 Act, would seem sufficient to refute the nebulous suggestion of a prohibition under Part II which would act as a limitation upon comprehensive water resource utilization.

The paramountcy of the public interest in comprehensive water power utilization, as against private developers of public resources for electric power, is also manifested by such requirements as those for non-interference with reservations and the navigable capacity of navigable waters (Section 4 (e)), and for "the construction, maintenance, and operation by a licensee at its own expense of such lights and signals as may be directed by the Secretary of War, and such fishways as may be prescribed by the Secretary of

Commerce" (Section 18), as well as for the construction, "without expense to the United States," of a "lock or locks, booms, sluices, or other structures for navigation purposes" (Section 11 (a)).

Part I further limits the issuance of licenses for a period not exceeding 50 years (Section 6), contemplates that at the expiration of the license the United States shall have the right "to take over and thereafter to maintain and operate any project" upon appropriate payment to the licensee (Section 14), and provides that a license shall not be granted when "in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself" (Sections 7 (b) and 4 (e)). Provision is also made for giving preference to the applications of states and municipalities by Section 7 (a) and for the issuance of licenses for power development to states and municipalities without charge where "such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes" (Section 10 (e)).

These various provisions which amply reflect the general Congressional concern for giving protection and priority to the public as against private interests cannot be reconciled with the view of the court below that Congress expressed an intention to withhold from the Commission any

power to qualify a license for use of public lands for private commercial purposes, by attaching a condition for interconnection with Government lines, deemed necessary for effectuation of the public interest. The policy reflected in the Act by the simultaneous provision for public and private interests in power development is wholly consistent with such a condition. See *Report of the President's Water Resources Policy Commission* (1950), vol. 1, pp. 221–225.

D. The decision below is inconsistent with federal power policy

The court of appeals' decision entirely forecloses the Commission from taking account of the need for "wheeling" arrangements in the public power program, a problem which the activities of the Federal Government in the development of hydroelectric power in recent years have made one of great magnitude. This barrier to the coordination of public and private facilities presupposes an unexpressed Congressional hostility to the utilization of public power which is not reflected either in the statute or in the increased provision for the development of such power. A succession of related federal statutes belies any such hostility. (See, *e. g.*, Boulder Canyon Project Act (1928), 45 Stat. 1057; Tennessee Valley Authority Act, 48 Stat. 58 (1933); National Industrial Recovery Act, 48 Stat. 195 (1933) and Emergency Relief Act of 1935, 49

Stat. 115 (Bonneville Dam and Central Valley Project in California); Rural Electrification Act, 49 Stat. 1363 (1936); Flood Control Act of 1936, 49 Stat. 1570; Bonneville Project Act, 50 Stat. 731 (1937); Fort Peck Act of 1938, 52 Stat. 403; Reclamation Project Act of 1939, 53 Stat. 1187).

As a result of Congressional action, the present installed capacity of federal hydroelectric power projects is 6,278,500 kilowatts, which will generate 30 billion kilowatt hours annually. Plants under construction and authorized for future construction have a capacity of 16,988,000 kilowatts and will produce 80 billion kilowatt hours annually. *Report of the President's Water Resources Policy Commission* (1950), vol. I, pp. 221–223. In his Annual Report for 1951, p. 123, the Secretary of the Interior reports that in the fiscal year 1951 he disposed of 24,764,000,000 kilowatt hours of energy at a total revenue of over $67,552,000.

The increase in public power has been accompanied by the development of principles for marketing federal power inconsistent with the decision below. These principles, reflected in Congressional enactments from the Tennessee Valley Act in 1933 through the Flood Control Act of 1944, encourage the widest possible use of available electrical energy, provide reasonable outlets, prevent the monopolization of power by limited groups, and make the use of federal resources by private interests subject to provisions pro-

tecting the public interests in low-cost electricity. See *Report of the President's Water Resources Policy Commission* (1950), vol. 1, pp. 226–228.

Wheeling arrangements, similar to the conditions imposed by the Commission in this case, effectuate this legislative policy and can result in considerable economies to the United States in the construction of transmission and substation facilities whenever a utility system, either privately or municipally owned, can be utilized to transmit power to customers of the United States or to agencies of the United States. Such arrangements, which avoid duplication of facilities, are also plainly essential to the development of a comprehensive plan for the power resources of the area. It is impossible to estimate accurately the number of situations in which such arrangements will be desirable, but Federal transmission networks are being constructed in the Pacific Northwest, in California, in the Missouri River Valley, in the Southwest, and in the Southeast, thereby expanding opportunities for economic interconnections of this character. Annual Report of the Secretary of the Interior (1951), pp. XX–XXIII, 56, 58–59, 138, 152, 153–154.

Congress has also indicated on many occasions that it looks with great favor upon wheeling arrangements for the distribution of public power as an instrument for carrying out its power policy, and at the same time as a means of saving

Government funds and critical defense materials, of avoiding the duplication of transmission facilities, and of coordinating public and private power facilities. This is evidenced by the frequent insistence that the Department of the Interior attempt to negotiate wheeling arrangements before constructing its own transmission lines, and its deliberate prevention of monopoly bargaining power in private utilities by the appropriation of funds for the construction of public transmission lines where satisfactory wheeling arrangements cannot be negotiated. Public Law 136, 82d Cong., 1st Sess., p. 8; Public Law 470, 82d Cong., 2d Sess., pp. 1, 7; S. Rep. 661, 81st Cong., 1st Sess., pp. 4, 13, 14; S. Rep. 1941, 81st Cong., 2d Sess., pp. 125, 145, 150; H. Rep. 339, 82d Cong., 1st Sess., pp. 2–3, 11; S. Rep. 499, 82d Cong., 1st Sess., pp. 4, 5, 7, 23; H. Rep. 888, 82d Cong., 1st Sess., p. 5; S. Rep. 1803, 82d Cong., 2d Sess., p. 2; H. Rep. 1628, 82d Cong., 2d Sess., p. 2; 95 Cong. Rec. 14116–14117; 96 Cong. Rec. 10497; 97 Cong. Rec. 7785, 7786, 7787, 7796, 7847–7848; 98 Cong. Rec. (unbound ed.) 3008, 9302, 9321, 9543.

A further reason for rejecting the restrictive interpretation of the court below is that the scope of the authority to prescribe the terms of licenses for the use of federal facilities would vary with the federal agency exercising jurisdiction. Although the Federal Power Commission is authorized to license "project

works"[18] upon the public lands and reservations of the United States (Section 4 (e)), the Secretary of the Interior has general authority, "under general regulations to be fixed by him," to permit the use of the public lands, national forests, and other reservations for electrical plants and transmission lines. 43 U. S. C. 957, 959, and 961, *infra*, pp. 57–60. Pursuant to these statutory provisions, the Secretary has promulgated regulations requiring applicants for the use of public lands for these purposes to interconnect with federal lines and transmit government power.

The general regulations for the use of public lands provide that power permits will be granted only where "it is determined that the approval of the right-of-way will not be contrary to the public interest, including that of the Government." 43 C. F. R. 244.14, 17 Fed. Reg. 5899, *infra*, p. 60. The regulations relating to transmission lines provide that "by accepting a right-of-way for a power transmission line, the applicant thereby agrees and consents to * * * allow the Department of the Interior * * * to utilize for the transmission of electrical power any surplus capacity of the line in excess of the capacity needed for the holder of the right-of-way." 43 C. F. R. 244.44 (d), 17 Fed. Reg. 5903, *infra*, p. 62. The authority of the Secretary of the Interior to

[18] "Project" is defined in Section 3 (11). See also fn. 3, *supra*, p. 7.

establish such conditions was recently upheld in *Idaho Power Co.* v. *Chapman,* decided June 2, 1952 (D. D. C.).

If the decision below is correct, the use of public lands for private transmission lines may be conditioned upon the transmission of Government power, so long as "project" lines under the Federal Power Act are not involved, since the decision of the court below is based upon the particular provisions of that Act. The capriciousness of this situation is illustrated in the instant case where the Company first applied to the Department of the Interior for a permit to construct the lines in question and, after the condition of interconnection was insisted upon, withdrew its application and filed an application with the Federal Power Commission for a license to construct virtually the same transmission lines as part of the project, *supra,* p. 10.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed, and the order of the Commission should be affirmed without modification.

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OCTOBER 1952.

APPENDIX

43 U. S. C. 957, 959, 961 provide as follows:

§ 957. RIGHT-OF-WAY TO ELECTRIC-POWER COMPANIES

The Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way to the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty acres, upon the public lands and national forests of the United States by any citizen or association of citizens of the United States for the purposes of generating, manufacturing, or distributing electric power.

§ 959. RIGHTS-OF-WAY FOR ELECTRICAL PLANTS, ETC.

The Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest, and other reservations of the United States, and the Yosemite and Sequoia National Parks, and the General Grant grove section of the Kings Canyon National Park, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and tele-

graph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided,* That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided further,* That all permits given hereunder for telegraph and telephone purposes shall be subject to the provisions of sections 1–6 and 8 of Title 47, regulating rights of way

for telegraph companies over the public domain: *And provided further,* That any permission given by the Secretary of the Interior under the provisions of this section may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

§ 961. RIGHTS-OF-WAY FOR ELECTRICAL POLES AND LINES

The head of the department having jurisdiction over the public lands is authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights of way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands, national forests, and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for telephone and telegraph purposes, to the extent of twenty feet on each side of the center line of such electrical, telephone, and telegraph lines and poles, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right of way herein granted for any one or more of the purposes herein named: *Provided,* That such right of way shall be allowed within or through any national park, national forest, military, In-

dian, or other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest: *Provided,* That all or any part of such right of way may be forfeited and annulled by declaration of the head of the department having jurisdiction over the lands for nonuse for a period of two years or for abandonment.

Any citizen, association, or corporation of the United States to whom there was issued, prior to March 4, 1911, a permit for any of the purposes specified herein under any existing law may obtain the benefit of this section upon the same terms and conditions as shall be required of citizens, associations, or corporations thereafter making application under the provisions of this section.

43 C. F. R. 244.14 (17 Fed. Reg. 5899) provides as follows:

§ 244.14. *Approval of right-of-way.* (a) Where an application is complete and in conformity with the law and regulations and all required reports have been obtained and it is determined that the approval of the right-of-way will not be contrary to the public interest, including that of the Government, the manager will approve the right-of-way.

(b) An application which does not conform with the law or regulations under which filed or the approval of which would be inconsistent with the public or Government interest, will be rejected.

43 C. F. R. 244.44 (17 Fed. Reg. 5903) provides as follows:

§ 244.44. *Terms and conditions.* By accepting a right-of-way for a power transmission line, the applicant thereby agrees and consents to comply with and be bound by the following terms and conditions, excepting those which the Secretary may waive in a particular case, in addition to those specified in § 244.9:

(a) To protect in a workmanlike manner, at crossings and at places in proximity to his transmission lines on the right-of-way authorized, in accordance with the rules prescribed in the National Electric Safety Code, all Government and other telephone, telegraph, and power transmission lines from contact, and all highways and railroads from obstruction, and to maintain his transmission lines in such manner as not to menace life or property.

(b) To make provision, or bear the reasonable cost (as may be determined by the Secretary) of making provision for avoiding inductive interference between any project transmission line or other project works constructed, operated, or maintained by him on the approved right-of-

way, and any radio installation, telephone line, or other communication facilities existing when the right-of-way is authorized, or any such installation, line, or facility thereafter constructed and operated by the United States or any agency thereof. This provision shall not relieve him from any responsibility or requirement which may be imposed by other lawful authority for avoiding or eliminating inductive interference.

(c) That the transmission line for which the right-of-way is authorized shall not be used for the transmission of any power generated otherwise than by and at the connecting generating plant until the regional administrator shall have given written authority for such use and then only on the terms and conditions expressed in such written authority.

(d) To allow the Department of the Interior, in the case of a right-of-way applied for on or after October 14, 1948, and covering a right-of-way for an electrical transmission line having a nominal voltage of 33 kv or more, to utilize for the transmission of electrical power any surplus capacity of the line in excess of the capacity needed by the holder of the right-of-way (subsequently referred to in this paragraph as "holder") for the transmission of electrical power in connection with the holder's operations, or to increase the capacity of the line at the Department's

expense and to utilize the increased capacity for the transmission of electrical power. Utilization by the Department of surplus or increased capacity shall be subject to the following terms and conditions:

(1) When the Department desires to utilize surplus capacity thought to exist in a line, notification will be given to the holder, and the holder shall furnish to the Department within 30 days a certificate stating whether the line has any surplus capacity not needed by the holder for the transmission of electrical power in connection with the holder's operations, and, if so, the extent of such surplus capacity.

(2) In order to utilize any surplus capacity certified by the holder to be available, or any increased capacity provided by the Department at its own expense, the Department may interconnect its transmission facilities with the holder's line in a manner conformable to approved standards of practice for the interconnection of transmission circuits. However, for the purpose of diminishing line losses and for other reasons, the Department shall have the option, in lieu of requiring the holder to transmit power, to require that the holder deliver power to customers of the Department from the holder's own generating facilities in exchange for a like amount of power to be delivered by the Department to the holder at points on the holder's line or on his transmission system, to the extent

of the unused capacity of the line for which a right-of-way is granted.

(3) The expense of interconnection will be borne by the Department, and the Department will at all times provide and maintain adequate switching, relaying, and protective equipment so as to insure that the normal and efficient operation of the holder's line will not be impaired.

(4) After any interconnection is completed, the holder shall operate and maintain his line in good condition; and, except in emergencies, shall maintain in a closed position all connections under the holder's control between the holder's line and the interconnecting facilities provided by the Department.

(5) The interconnected power systems of the Department and the holder will be operated in parallel.

(6) The transmission of electrical power by the Department over the holder's line will be effected in such manner and quantity as will not interfere unreasonably with the holder's use and operation of the line in accordance with the holder's normal operating standards, except that the Department shall have the exclusive right to utilize any increased capacity of the line which has been provided at the Department's expense.

(7) The holder will not be obligated to allow the transmission over his line by the Department of electrical power to any per-

son receiving service from the holder on the date of the filing of the application for a right-of-way, other than persons entitled to statutory preference in connection with the distribution and sale of electrical power by the Department.

(8) The Department will pay to the holder an equitable share of the total monthly cost of maintaining and operating the part of the holder's line utilized by the Department for the transmission of electrical power, the payment to be an amount in dollars representing the same proportion of the total monthly operation and maintenance cost of such part of the line as the maximum amount in kilowatts of the power transmitted on a scheduled basis by the Department over the holder's line during the month bears to the total capacity in kilowatts of that part of the line. The total monthly cost may include interest and amortization, in accordance with the system of accounts prescribed by the Federal Power Commission, on the holder's net total investment (exclusive of any investment by the Department) in the part of the line utilized by the Department.

(9) If, at any time subsequent to a certification by the holder that surplus capacity is available for utilization by the Department, the holder needs for the transmission of electrical power in connection with its operations the whole or any part of the capacity of the line theretofore certified as

being surplus to its needs, the holder may modify or revoke the previous certification by giving the Secretary of the Interior 30 months' notice, in advance, of the holder's intention in this respect. After the revocation of a certificate, the Department's utilization of the particular line will be limited to the increased capacity, if any, provided by the Department at its expense.

(10) If, during the existence of the right-of-way, the holder desires reciprocal accommodations for the transmission of electrical power over the interconnecting system of the Department to its line, such reciprocal accommodations will be accorded under terms and conditions similar to those prescribed in this paragraph with respect to the transmission by the Department of electrical power over the holder's line.

(11) The terms and conditions prescribed in this paragraph may be modified at any time by means of a supplemental agreement negotiated between the holder and the Secretary of the Interior or his designee.

U. S. GOVERNMENT PRINTING OFFICE: 1952

Weiser

PAYETTE RIVER

BLACK CANYON DAM (U.S.B.R.)

TO B.P.A. GRID SYSTEM (BONNEVILLE)

BOISE

Boise

BOISE RIVER DAM (U.S.B.R.)

RIVER

SNAKE

Blacks Creek

Thurman

ANDERSON RANCH DAM (U.S.B.R.)

OREGON

IDAHO

I D A H O

Thurman

ANDERSON RANCH DAM (U.S.B.R.)

OREGON

IDAHO

RIVER

Mountain Home

Bliss Plant

Bliss

ORIGINALLY PROPOSED DAM SITE

NOV. 1947 PLAN (EXHIBIT "K")

AUG. 1947 PLAN (EXHIBIT "J")

Hagerman

Clear Lk

Shos

Route on application to Federal Power Commission for Project No. 1975 (Apr. 1949)

Route on preliminary application for Right-of-Way to Department of the Interior

Aug. 1947 and Nov. 1947 Plans as designated

(Proposed interconnection to Idaho Power Co's. Existing Transmission Lines)

SCALE OF MILES

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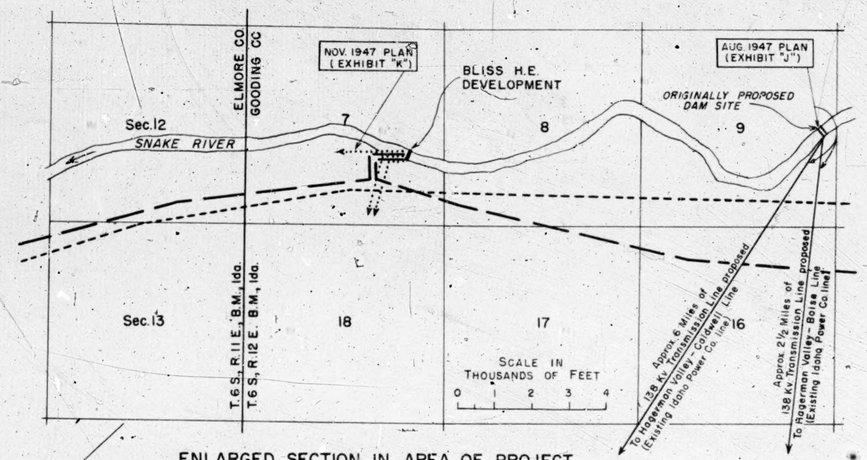

ENLARGED SECTION IN AREA OF PROJECT

BLISS H.E. DEVELOPMENT TRANSMISSION LINES

TO PALISADES PROJECT

TRANSMISSION LINES

TO PALISADES PROJEC

RIVER

AMERICAN FALLS RESERVOIR 1,700,000 AF

Pocatello

Dietrich

Bliss

ORIGINALLY PROPOSED DAM SITE

Hagerman

Minidoka

American Falls

AMERICAN FALLS DAM (Power Plant proposed U.S.B.R.)

MINIDOKA DAM (U.S.B.R.)

LAKE WALCOTT

96,700 AC. FT.

SNAKE

Clear Lk

Shoshone Falls

Twin Falls

224291 O - 52 (Inside back cover)